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Supreme Court of the United States

OCTOBER TERM, 1990

WARNER CABLE COMMUNICATIONS INC.,

Petitioner,

—v.—

CITY OF NICEVILLE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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PRELIMINARY STATEMENT

Respondent makes no effort to deal with the constitutional principles for granting certiorari presented by Warner. It implicitly admits the Eleventh Circuit's constitutional theories are erroneous. Respondent's opposition resembles a plea of confession and avoidance. While the confession is fully warranted, the avoidance fails because it rests on factual allegations that were never tried.

Warner was denied a trial on First Amendment issues because the Eleventh Circuit seriously eroded well-established guarantees of free speech and press. The court below held that intentional destruction of private cable speakers by a government that wishes to be the only speaker in the community does not raise First Amendment concerns. But when government elects to silence a speaker through predatory competition and misuse of sovereign advantages, there are indeed First Amendment concerns. This Court's *Preferred* decision[1] requires that Warner be afforded a trial to develop the First Amendment issues in a concrete factual setting.

That is the gravamen of Warner's petition. Niceville ignores these constitutional issues; it fails even to discuss them. Instead, the City argues the facts *as if* there had been a trial. The City repeatedly argues its good intentions, the possibility that Warner may survive, and other matters as if these were facts found at trial.

The Eleventh Circuit was clearly wrong in its basic constitutional theory that "Warner fails to assert a protected first amendment interest *even* if the projected City-owned system will *surely* render Warner's continued operation in Niceville economically infeasible." (Pet. App. 5a; emphasis added). The City does not try to defend that radical proposition. Rather, it argues as if there had been factual findings that the City will not use predatory tactics and that Warner may possibly survive. Niceville's inability to defend the appellate court's constitutional theories is a concession they are indefensible under First Amendment jurisprudence. If the govern-

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1 *City of Los Angeles* v. *Preferred Communications, Inc.*, 476 U.S. 488 (1986).

ment can make itself the sole speaker in a community by exploiting its taxing and other economic powers rather than by a statutory prior restraint, then the First Amendment is reduced to an empty formality.

Warner demonstrated that the intentional infliction of economic loss by governmental action does raise First Amendment concerns. (Pet. 15). Warner further demonstrated that discriminatory taxation targeted at an individual speaker also violates the First Amendment. (Pet. 15-16).[2] Each of those constitutional propositions is incontestable. Neither is addressed by the City.

The importance of a trial to frame the First Amendment issues is clear. Cable now represents a major and growing source of news, information and entertainment. The type of threat faced by Warner in Niceville is becoming nationwide. The *amici* briefs in support of Warner's petition—filed on behalf of the nation's thousands of cable television systems serving approximately 60 million subscribers—demonstrate the urgency for review by this Court. *Amici* demonstrate that the threat to free speech in Niceville, contrary to respondent's assertion (Br. 19-20), is not an isolated phenomenon but is characteristic of a growing threat to cable speakers nationwide. At least 84 municipalities are threatening to overbuild private cable systems—an eight-fold increase in just two years. (Pet. 12 n.11).[3]

The *amici* demonstrate that the Eleventh Circuit's radical surgery on the First Amendment, unless corrected, will give *carte blanche* to local political officials that wish to displace private cable speakers with a government-controlled press.

This is a landmark First Amendment case. The ruling of the court below will undermine cable's growing role in providing local news, information, public affairs programs, and commentary on the local political process. In some communities, as *amici* point out, cable is the only local video medium. This Court should decide whether Warner's allegations of

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2 The rationale in *Leathers* v. *Medlock*, 59 U.S.L.W. 4281 (April 16, 1991) reaffirms that principle.

3 These figures are not challenged by the City. (Br. 20).

intentional governmental efforts to silence its voice through predatory economic tactics and targeted discriminatory taxation entitle Warner to a trial. There is no basis for respondent's suggestion that a decision should be delayed until Warner's capacity to exercise its First Amendment rights has been destroyed.

I. A GOVERNMENT'S PREDATORY ECONOMIC COMPETITION AND TARGETED DISCRIMINATORY TAXATION, DESIGNED TO DESTROY A PRIVATE SPEAKER SO THAT ONLY THE GOVERNMENT MAY SPEAK, THREATEN FIRST AMENDMENT RIGHTS

Under *Preferred* and *Leathers* v. *Medlock*, 59 U.S.L.W. 4281 (April 16, 1991), cable speakers are clearly entitled to First Amendment protection. The Eleventh Circuit, however, has limited such protection to the vanishing point by ruling that government is free to destroy a cable speaker, and take over as the sole speaker, so long as it uses subsidized below-cost pricing and targeted discriminatory taxation rather than an outright statutory ban: "Warner fails to assert a protected first amendment interest *even* if the projected City-owned system will *surely* render Warner's continued operations in Niceville economically infeasible."

That startling principle was laid down in the face of Warner's allegations that Niceville intended to drive it from the market, to use predatory and tax-subsidized competition and discriminatory taxes and regulations, and to become the sole video speaker in the community. The court of appeals' holding is not, and cannot be, the law of the First Amendment.

To this Niceville replies—because it refuses to try to defend the court's draconian legal theory—"Warner's potential demise in the face of competition would not at all be the certainty which it predicts in its petition." (Br. 6). That is speculation about an untried allegation. A petition for certiorari is no place to argue the facts; a trial is. Moreover, contrary to the City's conjecture, the Eleventh Circuit assumed Warner's certain demise ("even if the City-owned system will *surely* render Warner's continued operations in Niceville economi-

cally infeasible") but nonetheless found no First Amendment issues. That is clear constitutional error.[4]

The City, significantly, does not challenge the following facts set forth in Warner's petition (6-7, 20): that Niceville's below-cost pricing strategy, which it predicts will capture 75% of Warner's subscribers in the first year alone, will be subsidized by general municipal tax revenues;[5] that the City's $2,000,000 construction bonds will be backed by tax revenues and issued at rates unavailable to private parties; that the City's system will be immune from the franchise fees and other taxes that Niceville will continue to impose on Warner;[6] or that the City's broad discretionary regulatory powers over Warner's business allow it to drive up Warner's costs of operation. That is quite a list of non-denials.

Niceville, not denying those critical facts, argues there is no iron-clad proof that it has a predatory "intent" despite its subsidized below-cost prices. But the power to destroy Warner's system is undeniable and there is already evidence of the purpose. Niceville cannot explain away the predatory remarks by the Chairman of its Cable Committee.[7]

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4 Nor does Niceville try to defend the appellate court's theory that a government would violate the First Amendment if it *physically* drowned out a speaker, but is free to destroy the speaker with predatory and discriminatory *economic* weapons. (Pet. App. 8a-9a). In declining to discuss that constitutional theory, Niceville chooses wisely, because the distinction between *physical* and *economic* drowning out lacks any First Amendment significance.

5 Niceville's reference (Br. 6) to a temporary decline in Warner's subscribers in the nearby Sandestin resort community as a result of an overbuild is irrelevant. Warner there competes on a level playing field against a private cable system, not a government with special taxing and other sovereign powers, and has recaptured most of its subscribers.

6 *Leathers* condemns such discriminatory taxation aimed at a single competitor in the same medium—especially where, as here, there is concrete evidence of censorial intent (*see* Pet. 5, 22-23; *infra* p. 7).

7 Contrary to Niceville's claim (Br. 8 n.12), Cable Chairman Brown, in boasting "there is not gonna be a competitive system in Niceville," was referring to the City's impact on Warner, as shown by the City Council's minutes. (Pet. App. 75a). Cosmic did not surrender its franchise until three

Although advancing its own (untested) protestations of purity, Niceville concedes that municipal overbuild threats can be used by local political officials "as a franchise renewal negotiation tactic" or "to extract franchise concessions from a private cable operator which would otherwise be prohibited by the 1984 Cable Act" (Br. 20). Such ominous threats will chill First Amendment speakers. As this Court recently declared in *Leathers*, when a "scheme appeared to have such potential for abuse . . . we concluded it violated the First Amendment." 59 U.S.L.W. at 4283.

II. A GOVERNMENT SPEAKER MAY NOT COMPETE WITH A PRIVATE SPEAKER IN A MARKET WHERE ONLY ONE CAN SURVIVE

Quite aside from the question whether government may use economic coercion to stamp out private speech, there is the additional question whether government may compete, even on fair terms, where a community can sustain only one cable speaker. Warner thinks not. (*See* Pet. 16-18). Where only one speaker is possible, the government may not be that speaker. Tellingly, Niceville is also silent on this First Amendment principle.

Warner was denied a trial on the question of whether Niceville is, in fact, the type of community that can sustain only one system. The parties disagreed on that question, and the district court found this created a factual issue. (Pet. App. 42a). Yet the Eleventh Circuit simply assumed that

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months after Chairman Brown's remarks; and Brown conceded that at the time of his remarks he knew nothing of Cosmic's plans under its new cable franchise. (Supp. App. 1a).

Neither can the City explain away Chairman Brown's remark that "the big hammer of the franchise was originally rate control; if you're controlling somebody's money you are controlling them." (Br. 8 n.12). Warner alleges that Niceville still possesses the power to regulate rates (Pet. 6)—a disputed factual issue that should have been resolved at trial. (Pet. 6 n.7).

Moreover, the City does not seek to explain away Chairman Brown's admission that the City would use its regulatory powers to disadvantage Warner (Pet. App. 79a).

Niceville could sustain multiple systems. Niceville now merely repeats that assumption.

If only one cable system can survive in Niceville, and should the survivor be the City's subsidized system, there will be no private video speaker in the City to comment on local government and politics and other issues of community concern. Niceville does not challenge that fact. Nor does it question cable's growing role in reporting on local news and public affairs.[8] Niceville's acquiescence once more emphasizes the need for plenary review of the important First Amendment issues raised by this case. As this Court declared in *Leathers*, "the press plays a unique role as a check on government abuse." 59 U.S.L.W. at 4283.

III. NICEVILLE'S BRIEF RELIES UPON UNPROVEN FACTS AND THUS DEMONSTRATES THE ELEVENTH CIRCUIT'S ERROR IN DENYING WARNER THE TRIAL REQUIRED BY *PREFERRED* AND THE FIRST AMENDMENT

Niceville argues its case on the merits, as if there had been a trial. There was no trial because the Eleventh Circuit concluded that no set of facts could show an infringement of Warner's First Amendment rights. By arguing its own untried version of the facts, Niceville concedes that it is essential to a First Amendment analysis to know the facts, and, therefore, in effect concedes that a trial was necessary. Warner's Petition (18-25) demonstrates that it is entitled to a trial on the following First Amendment issues:

1. *Will the government exploit its sovereign powers and use predatory tactics to drive Warner from the community*? The district court found that this was an issue for trial, but the Eleventh Circuit avoided the question by holding that nothing Niceville might do could conceivably infringe Warner's rights. If that revolutionary proposition differs from the law laid down by this Court, and we submit it does, then Warner is entitled to a trial.

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8 *Amici*'s briefs provide substantial data on the growing role of cable as an electronic publisher of local news, public affairs programs and commentary on the local political process.

2. *Can the Niceville market sustain more than one cable speaker*? The district court found this was a factual question for trial. The Eleventh Circuit, however, merely assumed the market could sustain multiple cable speakers (*see* Pet. App. 7a). Niceville now asks this Court to make the same assumption (Br. 6, 11). That is not a legitimate method of denying Warner its day in court.

3. *Was Niceville motivated to suppress Warner's speech because of objections to its editorial judgments*? The summary judgment record suggests that Niceville was motivated, at least in part, by objections to Warner's editorial judgments. It objected to Warner's dropping the Jim and Tammy Bakker religious network and was also moved to act by its inaccurate belief that all program decisions were made by New York City executives. In light of this factual record, there was certainly no basis for the Eleventh Circuit's assumption that Niceville did not "target" Warner's speech. (Pet. App. 5a n.4).[9]

Niceville now asks this Court to follow the Eleventh Circuit by accepting its untried assertion that objections to Warner's editorial judgments played no part in the City's decision to launch its own cable system (Br. 15).[10] This issue raises serious First Amendment concerns. Government action is "unconstitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints." *Leathers*, 59 U.S.L.W. at 4283. The question of the City's motives is a matter for trial; for proof, not faith.

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9 The district court, in contrast, observed that Warner might be able to prove that its " 'voice' was targeted for suppression by the City." (Pet. App. 44a).

10 Niceville claims it objected to the deletion of the Bakkers' religious network several years before passing the municipal cable ordinance and that its objection "was resolved at that time" (Br. 5 n.5). The City's objection was never "resolved"; Warner did not restore that religious network and the City officials' grievances continued unabated. When the City decided to establish a cable system, the Jim and Tammy Bakker network was one of the very first it signed up (Pet. App. 84a-85a); and the local political officials agreed to carry this religious network for at least three years (Pet. App. 86a-87a). Contrary to respondent's claim (Br. 9-10), Warner did protest the City's programming objections below (*see* Supp. App. 1a-2a).

4. *Can the City make the showing required by the First Amendment's strict test*? Niceville, as shown in the Petition (24-25), must demonstrate (a) a compelling state interest in supplanting the only private cable speaker with a government-controlled speaker, and (b) that the means chosen to achieve its goals are the least restrictive means available. Warner was entitled to a trial on these issues under *Preferred* and the First Amendment. But the Eleventh Circuit concluded "we need apply no balancing test to the City's action." (Pet. App. 11a).

Niceville, once again, does not try to defend the Eleventh Circuit's constitutional analysis. On the contrary, it *sub silentio* concedes this was constitutional error because it repeatedly argues it had substantial reasons for launching a municipal cable system (Br. 2-7, 11)—*i.e.*, better programs, better service, lower subsidized prices, and two-way alarm and other bi-directional services. Warner was entitled to a trial to demonstrate that there were not compelling, or even important, interests for Niceville's predatory action.

Warner was also entitled to a trial to prove that Niceville could have achieved its alleged goals of better programs and services without suppressing private cable speech (*e.g.*, by encouraging Cosmic or other cable systems to enter the cable field). The City's own expert conceded that many of Niceville's goals were infeasible or could be achieved without displacing private speakers. (Pet. App. 91a-92a).

Preferred entitles Warner to a trial on all the foregoing issues. Niceville cannot argue facts the Eleventh Circuit would not allow to be tried.

IV. THE CABLE ACT DOES NOT IMMUNIZE NICEVILLE'S FIRST AMENDMENT VIOLATIONS

Niceville, noting the Cable Act allows municipal ownership, implies this somehow immunizes its First Amendment violations. (Br. 6-19). That is a frivolous argument. The Act does not bless unfair and predatory municipal competition that will displace an existing private cable speaker and force a new entrant (Cosmic) to tear up its franchise. Congress had no intention of authorizing such predatory conduct antitheti-

cal to the First Amendment; the Act was passed, in large part, to protect cable systems from unfair conduct by local political officials and to encourage cable's growth.

The snippet of legislative history cited by Niceville (Br. 17 n.22) shows that Congress assumed that cities would engage in normal "profitable" activities in the cable field, not below-cost predatory pricing subsidized by raising taxes.[11]

V. THE CONSTITUTIONAL ISSUE IS RIPE

Although the Eleventh Circuit laid down drastic First Amendment principles that will adversely affect Warner, that have driven away a new private entrant (Cosmic) and that threaten the entire cable industry—radical constitutional principles that Niceville does not even try to defend—the City nevertheless suggests that certiorari should be denied because the constitutional concerns are "premature." (Br. 22; *see also* 19-21). But the Eleventh Circuit, disagreeing with the district court, correctly held the constitutional issues were ripe. Warner need not wait until its free speech rights are totally suppressed before suing.[12]

The Eleventh Circuit's opinion involves an imminent threat to Warner and to hundreds of other private cable speakers across the nation. Niceville concedes there are at least 84 threatened municipal overbuilds (Br. 19-20)—an eight-fold increase in two years (Pet. 12 n.11). As shown by the *amici*

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11 Congress was sensitive about First Amendment hazards of municipal ownership. It provided that programming decisions should be made by an independent entity created by the local franchising authorities. (47 U.S.C. § 533(e)). Niceville violated even this minimal constitutional safeguard. The local politicians selected 19 program services—the bulk of its schedule—before going through the ritual of appointing their friends to a program board. (Pet. 5a n.6).

12 Niceville concedes it has taken concrete steps to launch its cable system (Br. 2). It has also entered into three-year contracts with program suppliers for the bulk of its schedule. (Pet. App. 83a-85a). Niceville is poised to proceed with its bond issue as soon as litigation is resolved.

briefs on behalf of the nation's cable speakers, a trial to develop First Amendment ground rules is essential.[13]

The Eleventh Circuit's opinion is a radical and disturbing departure from time-honored First Amendment values. It should be reviewed now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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13 There is no merit to respondent's suggestion that the Court should defer acting because the electronic media are undergoing "transition" and technologies now "in their infancy" may someday supersede cable (Br. 21-22). The sacrifice of Warner's First Amendment rights cannot be justified by speculation about possible "transitions" and future technological developments. The current state of development of cable technology (the huge capital investment required to build and upgrade cable systems and launch new program services) requires clear constitutional guidelines now.

SUPPLEMENTAL APPENDIX

TESTIMONY OF GARY BROWN MEMBER OF NICEVILLE CITY COUNCIL AND CHAIRMAN OF CABLE TELEVISION COMMITTEE

Q. To your knowledge, was Cosmic given any time frame in which they must construct their competing system with Warner?

A. I don't recall a specific time frame, no.

Q. To you knowledge, and in your capacity as sitting on the cable committee, had you inquired of Cosmic between October of 1984, and February of '85, about their progress?

A. I don't recall asking Cosmic directly as to what their progress was.

Q. If you didn't ask them, did they come and volunteer to you?

A. I don't recall any information as to their progress at that time.

(Sept. 9, 1986; Dep. Tr. 103-104).

PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF UNCONTESTED MATERIAL FACTS AND PLAINTIFF'S STATEMENT OF FACTS IN RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

In the past, the City has asserted pressure on Warner in an effort to control programming of channels offered on basic service. (p. 3).

* * *

39. Admitted, but more specifically, the complaints that Mrs. Edge received from Warner's subscribers pertained to periodic cable service outages and lack of some programming that the subscribers desired. (Depos. of Jessie Edge, October 7, 1986 at 7-8.) (p. 14).*

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* *See* Pet. App. 80a-81a quoting Councilmember Edge's complaints about religious programming.